Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE OF OHIO
Petitioner

-vs-

DONALD RAY HARPSTER
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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79 pp.

QUESTIONS PRESENTED

I.

FEDERAL AND STATE COURTS INTERPRETING *ABNEY V. UNITED STATES*, 431 U.S. 651 (1977) DISAGREE ON WHETHER A CRIMINAL DEFENDANT HAS A CONSTITUTIONAL RIGHT TO HAVE HIS DOUBLE JEOPARDY CLAIM REVIEWED PRIOR TO TRIAL. IS THERE A FIFTH AMENDMENT CONSTITUTIONAL RIGHT TO PRETRIAL REVIEW OF A DOUBLE JEOPARDY CLAIM?

II.

THIS COURT HAS INDICATED THAT A TRIAL COURT HAS DISCRETION TO GRANT A MISTRIAL IN APPROPRIATE CASES. *ARIZONA V. WASHINGTON* 434 U.S. 497 (1978). DOES A TRIAL COURT ABUSE ITS DISCRETION GRANTING A MISTRIAL WHERE THE DEFENSE ATTORNEY VIOLATES A COURT ORDER AND INTRODUCES IRRELEVANT PENALTY EVIDENCE BEFORE THE JURY?

LIST OF PARTIES

Petitioner is the State of Ohio.

Respondent is Donald Ray Harpster.

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OPINIONS AND JUDGEMENTS BELOW

The Sixth Circuit Court of Appeals mandate is unreported and contained in the appendix at A1. That court's order denying reconsideration is unreported and contained at appendix A2. That court's opinion is reported at 128 F.3d 322 (1997) and contained at appendix A3. The order and opinion of the United States District Court, Northern District of Ohio, Eastern Division granting Respondent Habeas Corpus is unreported and contained at appendix A22. That court's order denying Petitioner's motion to amend is unreported and contained at appendix A34. That court's order granting Respondent's motion for stay is unreported and contained at appendix A35. The Summit County, Ohio Court of Common Pleas decision denying Respondent's motion to dismiss is unreported and contained at appendix A36. That court's order granting a mistrial is unreported and contained at appendix A38.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 18, 1997. (A-3). Jurisdiction exists under 28 U.S.C. section 1254(1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States
Amendment V
Reproduced at page A40.

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED - CONTINUED

Ohio Revised Code 2907.12
[Felonious Sexual Penetration]
Reproduced at page A41.

Ohio Revised Code 2951.02
[Criteria for and probation or suspension of sentence; conditions]
Reproduced at page A43.

Section 1254(1), Title 28, U.S. Code
Reproduced at page A44.

Section 1291, Title 28, U.S. Code
Reproduced at page A45.

STATEMENT OF THE CASE

The Respondent was indicted in Summit County, Ohio for one count of Felonious Sexual Penetration violation of O.R.C. 2907.12(A)(1)(b). The case was assigned to the Honorable Judge Beth Whitmore and the Respondent pled not guilty to this charge. The Respondent filed a motion to suppress and on March 12, 1996 the trial court held an evidentiary hearing on this motion. The trial court subsequently overruled this motion to suppress. On April 15, 1996 a jury trial commenced. Prior to selecting the jury, Petitioner made a motion in limine to prohibit the Respondent from specifying at trial the mandatory penalty for Felonious Sexual Penetration.

The Respondent argued that this penalty should be admitted at trial because the police had him read it before he confessed. The trial court granted Petitioner's motion and prohibited the Respondent from specifying the penalty for Felonious Sexual Penetration. The trial court allowed the Respondent to state that Detective Mathews showed him the penalty and he could describe the penalty but he could not state "what that actual penalty is." During trial the Respondent described this penalty as tough, bad, terrible, and draconian.

The fourth witness for the State, Detective Mathews, testified on direct examination about the Respondent's confession. During cross-examination of Detective Mathews, Respondent asserted that the penalty for Felonious Sexual Penetration "meant no probation." The Petitioner moved for a mistrial contending that the Respondent had violated the trial court's order and Ohio law by disclosing that the penalty was mandatory. The

trial court heard arguments of counsel, declared a fifteen-minute recess to review the record and her notes, and then heard further arguments of counsel. The trial court then declared a mistrial, finding that no curative instructions could provide both parties a fair trial in this particular matter.

A new trial was scheduled for July 29, 1996. On July 19, 1996, Respondent filed a motion to dismiss contending that double jeopardy barred a new trial. On July 26, 1996 after hearing arguments of counsel, the trial court overruled this motion restating the court's rationale for granting the mistrial. That day, Respondent filed a Petition for Writ of Habeas Corpus in United States District Court and it was assigned to the Honorable Judge Bell. The Petitioner argued that a stay should not be granted and that the federal court should abstain from asserting jurisdiction in this case. Judge Bell granted a 24-hour stay of the State trial and ordered the parties to argue the merits of the Petition for Habeas Corpus on Monday, July 29, 1996.

On July 29, 1996 after hearing arguments of counsel, Judge Bell granted the Petition for Habeas Corpus. On July 30, 1996 Judge Bell filed written findings indicating that there was not a manifest necessity for a mistrial. The Petitioner's motion to amend the court's judgment was denied. The Petitioner appealed the District Court's order to the Sixth Circuit Court of Appeals.

The Petitioner argued that the district court did not have jurisdiction to intervene in an ongoing state prosecution and that the court erred when granting Habeas Corpus Relief. On September 18, 1997, the Sixth Circuit

affirmed the district court's decision denying both of petitioner's arguments. On November 4, 1997, petitioner's motion for rehearing and motion for rehearing en banc were denied. On Nov. 12, 1997 the court filed its mandate.

STATEMENT OF THE FACTS

Respondent was the live-in boyfriend of Sally Petrak and she had a three-year-old daughter, Lauren Petrak. In the summer of 1995, Sally noticed that Lauren's behavior had changed and that she was becoming very whiny and often fondled herself. On August 31, 1995, Lauren got out of the bath and ran downstairs dressed only in a towel. She was very upset, nervous and anxious and told her mother that she did not want her daddy putting her panties on. Although Respondent was not Lauren's biological father, she referred to him as her daddy. After Respondent went to work, Lauren showed her mother where her daddy had touched her by spreading her vaginal area and pointing to it. Lauren told her mother that her daddy had touched her in her "pee pee" and her "butt." Sally immediately moved out of the Respondent's house and later took Lauren to the Children's Hospital Care Center. Lauren told Donna Abbott, a pediatric nurse practitioner, that her daddy had touched her in her private parts and pointed to her "pee pee" and "butt."

On September 13, 1995, Detective Mathews asked the Respondent to come to the Akron Police Station and give a statement. After Detective Mathews interviewed him for approximately one half hour, Respondent denied the sexual abuse and returned home. On October 2, the Respondent voluntarily took a polygraph exam and it showed deceptiveness. The Respondent explained the deceptiveness based upon "things I did to my sister, I don't know." The Respondent admitted that when he was eleven, he continuously sexually abused his five-year old sister. The Respondent voluntarily took a second polygraph on October 10, 1995. This exam also showed

deceptiveness. The Respondent returned home after each polygraph exam.

On October 25, 1995 at approximately 9:00 a.m., Detective Mathews asked the Respondent to come to the Akron Police Station to give one more statement and the Respondent voluntarily went to the police department. The Respondent was given his Miranda rights and he waived those rights. While questioning the Respondent, Detective Mathews told Respondent he could possibly receive counseling, but no promises were made. After talking to the Respondent about sexually abusing his sister, Detective Mathews opened up the Ohio Revised Code and Respondent read O.R.C. 2907.12, Felonious Sexual Penetration. The Respondent then admitted that he placed his finger inside Lauren's vagina when she was awake in bed. The Respondent then gave a written and taped confession.

REASONS FOR GRANTING WRIT

I. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN FEDERAL AND STATE COURTS AND DETERMINE WHETHER A CRIMINAL DEFENDANT HAS A FIFTH AMENDMENT CONSTITUTIONAL RIGHT TO IMMEDIATE APPELLATE REVIEW OF A DOUBLE JEOPARDY CLAIM PRIOR TO TRIAL.

Thirteen states including Ohio prohibit a defendant from immediately appealing a trial court's pretrial order denying a motion to dismiss on double

jeopardy grounds.[1] Federal courts find that a defendant has a constitutional right to have this order reviewed prior to trial. Both state and federal courts cite *Abney v United States,* 431 U.S. 651 (1977) to support their decisions. Because of this conflict, federal courts are intervening in ongoing state prosecutions. Should this court resolve the ambiguity in *Abney* and decide whether a Defendant has a constitutional right to appeal a double jeopardy claim prior to trial?

A. There Is A Conflict Between Federal And State Courts On Whether Criminal Defendants Have A Fifth Amendment Right To Pretrial Review Of Their Double Jeopardy Claims.

This court has not indicated whether a defendant has a constitutional right to appeal his double jeopardy claim prior to trial. Instead, this court interpreted 28 USC§1291 and found that in federal criminal cases, a defendant has a statutory right to appeal this issue before trial. *Abney v. United States*, 431 U.S. 651 (1977). In *Abney*, this court hinted that this right of appellate review was of constitutional dimension. *Id.* at 661-662. But this

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[1] Wenzel v. Enright, 623 N.E.2d 69 (Ohio 1993); *West v. Commonwealth*, 455 S.E.2d 1 (Va. 1995); *State v. Miller*, 346 S.E.2d 705(S.C. 1986); *State v. Michaels*, 682 S.W.2d 162 (Mo. App. 1984); *Burlson v. State*, 552 So.2d 187 (Ala. Cr. App. 1989); *State v. Fisher*, 579 P.2d 167 (Kan. App. 1978); *State v. Joseph*, 374 S.E.2d 132 (N.C. App. 1988); *People ex rel. Mosley v. Carey*, 387 N.E.2d 325 (Ill. 1979), *cert. denied*, 444 U.S. 940 (1979); *State v. Robederux*, 475 N.W.2d 915 (N.D. 1997); *State v. Salzmann*, 850 P.2d 1122 (Or. App. 1993), *cert. denied*, 510 U.S. 1040 (1994); *State v. Murphy*, 537 N.W.2d 492 (Minn. App. 1995); *Schrimsher v. State*, 599 A.2d 444 (Md. 1991); *People v. Young*, 540 N.Y.S. 392 (A.D. 4 Dept. 1989).

court also noted there is no constitutional right of appeal. *Id.* at 656.

After this decision, Ohio and numerous other states determined that they would not review a defendant's double jeopardy claim until after trial. *See, State v. Crago*, 559 N.E.2d 1353 (Ohio 1990). These courts indicate that the issue in *Abney* was statutory, not constitutional:

> If the source of the right to appeal in *Abney* was the federal constitution itself, as defendant argues, we fail to see why the Court went to great pains to frame the issue as one of statutory construction. We also fail to see why the Court would have emphasized what has become a maxim: that the federal constitution does not give a defendant the right to appeal. The nature of the Court's analysis and the specificity in its holding persuade us that *Abney* is merely a case of statutory construction of a federal statute and not one that establishes a constitutional mandate for interlocutory appeals throughout the several states.

State v. Salzmann, 850 P.2d 1122, 1126 (Or. App 1993), *cert. denied*, 510 U.S. 1040 (1994); *Accord*, *West v. Commonwealth,* 455 S.E.2d 1 (Va. 1995).

"*Abney* does not mandate, as a matter of federal constitutional law, that a state provide a mechanism for an interlocutory appeal from the denial of a motion to dismiss on grounds of double jeopardy." *Wenzel v. Enright,* 623 N.E. 2d 69 (Ohio 1993); *Accord, State v. Miller,* 346 S.E.2d 705, 706 (S.C. 1986). "We do not interpret *Abney* as holding its result to be constitutionally required by either the federal double jeopardy provisions or due process principles." *People ex rel. Mosley v. Carey,* 387 N.E.2d 325 (Ill. 1979), *cert. denied,* 444 U. S. 940 (1979).

Although these state courts interpret *Abney* as a federal statutory construction case, federal courts unanimously interpret *Abney* to impose a constitutional right to review the double jeopardy claim prior to trial:

> However, because the Double Jeopardy Clause of the Fifth Amendment protects not only against multiple convictions but also "against being twice put to *trial* for the same offense," *Abney v. United States*, 431 U.S. 651, 660-62, 97 S.Ct. 2034, 2040-41, 52 L.Ed.2d 651 (1977), a portion of the constitutional protection it affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level, *see Justices of Boston Mun. Court v. Lydon,* 466 U.S. 294, 303, 104 S.Ct. 1805, 1810, 80 L.Ed.2d

> 311(1984); *Abney*, 431 U.S. at 662, 97 S.Ct. at 2041-42.
>
> (footnote omitted)

Gilliam v. Foster, 75 F.3d 881, 904 (4th Cir. 1996) *cert. denied* __ U.S. __ 116 S.Ct. 1849 (1996). A claim that a state prosecution will violate the Double Jeopardy Clause presents an exception to the general rule requiring federal courts to abstain from interfering with pending state criminal prosecutions. *Mannes v. Gillespie,* 967 F.2d 1310, 1312 (9th Cir. 1992). In this case the Sixth Circuit cited *Abney* in finding that the District Court properly intervened in the ongoing state prosecution:

> The Fifth Amendment's Double Jeopardy Clause protects individuals "not against being twice punished, but against being twice put into jeopardy." *Ball v. United States*, 163 U.S. 662, 669 (1896). Therefore, "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge ... must be reviewable before the subsequent exposure occurs." *Abney v. United States*, 431 U.S. 651, 662 (1977).

State v. Harpster, 128 F.3d 322, 325 (1997).

B. The Conflict Between Federal And State Courts Has Resulted In Federal Courts Intervening In Ongoing State Prosecutions.

Because federal and state courts disagree on whether *Abney* imposes a constitutional right "not to be tried" until appellate review of the double jeopardy claim, the Constitutional balance between the federal and state judiciary has been destroyed. One of the reserved powers left to the states was the maintenance of state judicial systems for the decision of legal controversies. *Atlantic Coast Line Rail Comp. v. Brotherhood of Local Engineers,* 398 U.S. 281, 285 (1970). Although the first congress created a federal judiciary, they were not given and have never been given the power to review directly cases from state courts. *Id.* at 286. Further, under the doctrine of comity, federal courts should not consider a federal claim until state courts have had the opportunity to act. *Rose v. Lundy,* 455 U.S. 509, 515-518 (1982). "In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising from its courts if a federal district court were permitted to substitute itself for the State's appellate courts." *Huffman v. Pursue,* 420 U.S. 592, 609 (1975). Now, because of this conflict, federal district courts are directly reviewing every unsuccessful double jeopardy claim raised prior to trial in the above state courts.

Not only are federal courts asserting direct appellate review over state court decisions, they are intervening in ongoing state prosecutions. In this case, trial was scheduled for Monday, July 29, 1996. Petitioner received a phone call Friday afternoon, July 26, 1996 and was told to immediately appear in federal district court. When petitioner appeared in federal court, he was served a petition for a Writ of Habeas Corpus and requested to argue this motion "on the merits." Although Petitioner was compelled to respond to a Writ of Habeas Corpus on

the eve of trial, at least in this case a federal court did not interrupt an ongoing state trial "as if the judge, jury and witnesses were participants in some illicit gathering." *Gilliam v. Foster,* 75 F.3d 881, 908 (4th Cir. 1996) [Wilkerson dissenting]. Federal courts should refrain from intervening in ongoing state prosecutions. *Younger v. Harris,* 401 U.S. 42, 46 (1971). Continuous federal intervention in ongoing state criminal trials is not appellate procedure, but appellate chaos.

C. This Court's Resolution Of The Fifth Amendment Issue Would Stop Federal Courts From Continuously Intervening In Ongoing State Prosecutions.

If this court grants certiorari in this case, Petitioner would be in a no-lose situation. Assuming this court finds that there is a constitutional right to appeal double jeopardy claims prior to trial, Ohio, South Carolina and the other states would amend their appellate procedure to provide a forum for these claims. Federal courts would not directly review state cases, state courts would consider the double jeopardy claims before federal review, and federal courts would not intervene in ongoing state criminal prosecutions. If this court finds no constitutional right of review, there would be no constitutional right to protect and federal courts would not intervene in ongoing state criminal prosecutions unless there is bad faith or harassment. *See, Younger v. Harris* at 49. No matter what this court decides, state prosecutors will no longer be trapped into prosecuting cases simultaneously in federal and state courts.

Whether there is a federal constitutional right to a pretrial review of a double jeopardy claim is a question of great national importance and is ripe for adjudication.

Because this court has never clarified *Abney*, state courts are divided on whether *Abney* imposes a federal constitutional right of immediate review of the double jeopardy claim. *See, State v. Milenkovich,* 458 N.W.2d 747, 750 (Neb. 1990). The Ohio Supreme Court typifies this confusion by overruling precedent on two prior occasions before a divided court reaffirmed the holding that there is no constitutional right of review. *See, Wenzel v. Enright,* 623 N.E.2d 69 (Ohio 1993). Previously, two members of this court stated that this court should decide this issue. *Spradling v. Texas,* 455 U.S. 971 (1982) [Justice Marshall and Justice Brennan dissenting on denial of certiorari]. Justice Brennan stated that whether the *Younger* abstention doctrine would bar federal intervention in a continuing state prosecution involving a double jeopardy claim is an open question. *Willhauck v. Flanagan,* 448 U.S. 1323 (1980) [Application for Stay]. The issue is not whether federal courts should abstain from protecting a defendant's constitutional right, but is there a constitutional right to protect?

The Petitioner claims that respondent does not possess this constitutional right. Although a criminal defendant may have an interest in having the double jeopardy claim reviewed prior to trial, the state's interest in speedy, efficient and uninterrupted disposition of criminal cases outweighs the defendant's interest in litigating this issue prior to trial. *See, Boston v. Lyons,* 466 U.S. 294, 333, 335 (1993) [Stevens concurring]. "The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction." *Cobbledick v. United States,* 309 U.S. 323 (1940). Because the defendant did not have a constitutional right to have his double jeopardy claim reviewed prior to his trial, the

federal courts did not have jurisdiction in this case. The petition for a Writ of Certiorari must be granted.

II. A FEDERAL COURT SHOULD NOT GRANT HABEAS CORPUS RELIEF WHERE A STATE TRIAL COURT DECLARES A MISTRIAL AFTER THE DEFENDANT INTRODUCES IRRELEVANT PENALTY EVIDENCE IN VIOLATION OF A COURT ORDER THAT MAY HAVE PREJUDICED THE JURY.

A. An Appellate Court Must Give The Highest Degree Of Respect To The Trial Court's Decision To Grant A Mistrial.

"Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial court must have the power to declare a mistrial in appropriate cases." *Arizona v. Washington*, 434 U.S. 497, 513 (1978). The government has the burden of proving a "manifest necessity" or "high degree" of necessity to support this decision. *Id.* at 505-506. This judgment "about the necessity is entitled to great deference, never more so than when the judgment is based on an evaluation of such factors as the admissibility of evidence, any prejudice caused by the introduction of such evidence, and the trial court's familiarity with the jurors." *Foster v. Gilliam*, 514 U.S. 300 (1995). (C.J. Rehnquest, Circuit Justice) citing *Arizona v. Washington* at 513-514.

The rationale for this great deference is that the trial court is in a "peculiarly good position to evaluate the jurors, the witnesses and the attorneys to evaluate the extent of the prejudice". *Abdi v. Georgia*, 744 F.2d 1500, 1503 (11th Cir. 1984), *cert. denied*, 471 U.S. 1006 (1985), *citing Arizona v. Washington*, 434 U.S. at 510-514. A

reviewing court searches for manifest necessity by examining the entire record without limiting itself to the trial court's findings. *Abdi* at 1503.

B. The Trial Court's Decision To Declare A Mistrial Was Made Carefully After Finding That A Corrective Instruction Could Not Cure The Prejudice Caused By Defense Counsel's Comments.

In determining whether the trial court abused its discretion, this court must determine whether the trial judge "carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner." *United States v. Bauman*, 887 F.2d 546, 550 (5th Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) [citations omitted]. Here, the trial court did not act in a precipitate manner before declaring a mistrial and gave careful consideration to the serious consequences of this decision. *Compare Glover v. McMackin*, 950 F.2d 1236 (6th Cir. 1991).

After Respondent asserted that the penalty for Felonious Sexual Penetration "meant no probation", the prosecutor stated "it's so prejudicial, that the State's entitled to a mistrial, particularly because the court ruled that this was not admissible." The court questioned Respondent and he explained why a mistrial should not be granted. The court declared a fifteen minute recess to review the testimony and the court's notes. The court then gave both attorneys a second opportunity to argue this motion. The trial court then declared a mistrial finding that the Respondent had violated the specific court order not to specify the penalty for Felonious Sexual Penetration, the jury had been prejudiced, and a curative instruction could not provide both parties a fair trial. The trial court subsequently ruled there was a manifest

necessity for a mistrial stating that the cumulative effect of Respondent's statements regarding the penalty caused the last statement about non-probation to prejudice the jury.

C. The Record Supports The Trial Court's Findings Of A Manifest Injustice Because The Respondent Introduced Irrelevant, Inadmissible And Highly Prejudicial Material Before The Jury In Violation Of The Court's Order.

The Respondent gave a verbal and written confession admitting to placing his finger in the vagina of his three-year-old victim. He confessed after reading O.R.C. 2907.12, Felonious Sexual Penetration, with the following penalty provision: "If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life."

The Respondent sought to introduce this penalty because it explains the reason why he confessed. The trial court ruled that this evidence does not come in, but gave Respondent some leeway by allowing him to state that "the penalty was shown to the defendant, but you may not state what the penalty is."

The Respondent stated to Detective Mathews that this penalty meant "no probation". The trial court told Respondent he violated the court's order. Respondent disagreed, stating, "[t]hat's exactly why the officer had him read it, Judge." But there is one major flaw in Respondent's argument – Detective Mathews never told

Respondent that this offense was non-probational and he never read this part of Ohio Revised Code. See O.R.C. 2951.02(F). Respondent did not ask this question to explain the circumstances surrounding his confession, but to prejudice the jury.

And the trial court had a basis to believe the jury was prejudiced in this case because Respondent emphasized punishment throughout the trial. Before the court ordered Respondent to "get off" the subject of punishment, Respondent extensively questioned the jury during voir dire about this issue by asking them if they would admit to something they did not do to "avoid punishment."

During opening, Respondent attempted to avoid his confession by arguing that he did not confess until "hearing and knowing the feasible penalties involved." He continued on this theme stating that he "could be punished and imprisoned" and was thinking that he "wasn't going to see his family again." The rhythm of his argument never changes, "Was Donald Harpster scared, coerced, threatened for lack of a better word, made to admit to things that he didn't do in order to avoid the draconian punishment that he knew he was looking at?" Finally, Respondent pounded on the theme of punishment when asking Det. Mathews "how bad the penalty was," whether "it's a tough penalty" and that "the penalty 'might scare' the Respondent."

The record supports the trial court's findings that the Respondent repeatedly emphasized punishment during trial. Because of Respondent's emphasis on punishment, the trial court properly believed that a corrective instruction could not cure the jury prejudice.

D. A Trial Court's Order Prohibiting Evidence Should Be Respected And The Integrity Of The Judicial Process Requires That A Litigant Obey This Order.

"[I]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (citations omitted) Here, the trial court repeatedly explained to the Respondent the court's limine order that he could not specify the penalty for Felonious Sexual Penetration. Just prior to cross-examining Detective Mathews, the Respondent renewed his objection and the court overruled it, telling Respondent the court's "ruling still stands, you are still not allowed to do it." Minutes later, the Respondent violated the court's order. A trial court properly grants a mistrial where the defendant violates a specific court order not to present certain evidence:

> At the first trial, defendant deliberately and repeatedly sought to undermine the court's pretrial ruling, and eventually circumvented it. It is essential to the judicial process that the parties obey the trial court's rulings. On these facts, we conclude that the motion for mistrial was granted for manifest necessity. The former prosecution, therefore, did not bar defendant's retrial.

State v. Bayse, 859 P.2d 542, 544, 122 Ore. App. 608, 613 (1993).

The flexibility of the manifest necessity standard, the requirement to respect the setting in which the trial judge found itself, and the need to protect the integrity of the judicial process indicates the trial court did not abuse its discretion declaring a mistrial in this case. *United States v. Cameron*, 953 F.2d 240, 246 (6th Cir. 1992).

In the seminal case of *Arizona v. Washington*, 434 U.S. 497 (1978), this court held that the trial court did not abuse its discretion when ordering a mistrial after the defendant introduced inadmissible and highly prejudicial statements that defendant's first conviction was reversed because the prosecutor had withheld evidence. *Id.* The Petitioner requests this court to review this record and find that the trial court did not abuse its discretion in finding a manifest necessity for a mistrial because:

1. The defendant violated a court order and Ohio law by specifying to the jury that the penalty for Felonious Sexual Penetration was non-probational.

2. Because of Respondent's emphasis on punishment throughout the trial, the jury was prejudiced by this information and a curative jury instruction could not cure this error.

2. Respondent did not know this offense was non-probational before he

confessed and the only reason to admit this evidence was to prejudice the jury.

3. The trial court acted carefully before declaring a mistrial, considering other alternatives and being mindful of the consequence of the court's decision.

5. The integrity of the judicial process requires the Respondent to respect and follow a court's evidentiary ruling.

Based on the foregoing arguments, this court must grant this writ.

CONCLUSION

It was not the intent of the Constitutional framers to have federal courts swoop down and gobble up ongoing state prosecutions like they were some type of small prey. Instead, state courts were intended to be on equal footing with federal courts and have the first opportunity to protect the constitutional rights of its citizens. But state courts cannot perform this function unless it is clear that there is a constitutional right to protect. Is there a constitutional right to pretrial review of a double jeopardy claim? This Court should grant this writ to decide this issue.

Respectfully submitted,

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UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-3962

DONALD RAY HARPSTER
Petitioner-Appellee,

v.

STATE OF OHIO
Respondent-Appellant

Filed: Sep. 18, 1997

BEFORE: **Lively, Kennedy**, and **Norris**, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio at Akron.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF
THE COURT
s/Leonard Green
LEONARD GREEN,
CLERK

Issued as Mandate: November 12, 1997
Costs: None
Filing Fee . . . . . $
Printing . . . . . $

Attest:
s/Valerie Fields
Deputy Clerk

A2
96-3962

UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD RAY HARPSTER
Petitioner-Appellee,

v. ORDER

STATE OF OHIO
Respondent-Appellant

Filed: Nov. 4, 1997

BEFORE: LIVELY, KENNEDY and NORRIS, Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT
s/Leonard Green
LEONARD GREEN,
CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD RAY HARPSTER
Petitioner-Appellee,

v. No. 96-3962

STATE OF OHIO
Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 96-01634—Sam H. Bell, District Judge.

Argued: August 7, 1997

Decided and Filed: September 18, 1997

Before: LIVELY, KENNEDY, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Philip D. Bogdanoff, OFFICE OF THE PROSECUTING ATTORNEY, Akron, Ohio, for Appellant. Kirk A. Migdal, Akron, Ohio, for Appellee. **ON BRIEF:** Philip D. Bogdanoff, OFFICE OF THE PROSECUTING ATTORNEY, Akron, Ohio, for Appellant. Kirk A. Migdal, Akron, Ohio, for Appellee.

OPINION

KENNEDY, Circuit Judge. Respondent-appellant, State of Ohio, appeals the District Court's order granting habeas corpus relief to petitioner-appellee, Donald Ray Harpster, under 28 U.S.C. §2254. The District Court found that the state court in petitioner's criminal trial declared a mistrial over defense objection without manifest necessity, thereby barring retrial of petitioner on double jeopardy grounds. For the following reasons, we AFFIRM.

I. Facts

A. Background

In the summer of 1995, petitioner lived with his girlfriend and her three year old daughter. On August 31, 1995, the girlfriend's daughter told her mother that petitioner had touched her private parts. The girlfriend and her daughter moved out of petitioner's house and went to the Children's Hospital Care Center, where the daughter repeated her allegations to a pediatric nurse-practitioner. On September 13 1995, Akron Police Detective Edward Mathews asked petitioner to accompany him to the police station to make a statement regarding the alleged sexual abuse. After an interview lasting from thirty to forty-five minutes, petitioner denied sexually abusing his girlfriend's daughter and returned home. The investigation continued. On October 2 and again on October 10, 1995, Akron Police detectives gave petitioner polygraph examinations. The results of these examinations indicated deceptiveness, but petitioner still denied the allegations and returned home after each one. Detective Mathews questioned petitioner a fourth time on the morning of October 25, 1995. During this interrogation, Detective Mathews had petitioner read Ohio Revised Criminal Code §2907.12, which stated that a person convicted of felonious sexual penetration "shall

be sentenced to life". During the same interrogation, Mathews suggested to petitioner, but did not promise or guarantee, that there was a possibility that he could receive remedial counseling instead of a life sentence if he confessed. Petitioner then confessed, and was arrested and charged with felonious sexual penetration.

B. State Court Proceedings

The state criminal trial began on April 15, 1996. During a pre-trial hearing, petitioner moved to suppress his confession as involuntary. Respondent moved to exclude the details of the penalty that attaches to felonious sexual penetration, namely, a mandatory life sentence. The trial court allowed petitioner's confession into evidence. It also issued the following ambiguously worded order:

> . . . .My ruling is that the evidence does not come in. You may have the testimony that he was shown the penalty from the statute and specify what the penalty is short of stating the penalty.
>
> You may have him testify that he was presented with the information so that you may argue whatever you wish to argue from the fact that the Defendant recognized that a certain penalty could be imposed in the particular case.

Joint Appendix at 160. Although the specific boundaries of the order were not clear, both parties and

the court agreed that petitioner would not be allowed to introduce evidence that he faced a life sentence.

During opening statements, defense counsel described petitioner's fear of the penalties for felonious sexual penetration. He stated that petitioner confessed only "after hearing and knowing the terrible penalties involved." Joint Appendix at 164. Defense counsel then continued with the statement that petitioner had realized that at that point if he didn't admit to something he didn't do, he could be punished and imprisoned and all of the things started going through his head, the fact of what happens in prison, that a little guy is likely – is going to get raped and beaten and he was scared.

Id. at 165. At this point, respondent objected to defense counsel's statements. The court summarily overruled the objection. Defense counsel continued to describe petitioner's fear of punishment, stating that he was concerned "that he wasn't going to see his family again, most importantly . . . that he wasn't going to see his son Nathan again." *Id.*

Then the state began its case. When defense counsel cross-examined the prosecution's fourth witness, Detective Mathews, the following exchange took place:

> Q: And you wanted him to know what the penalty was because you knew how bad the penalty was?
>
> A: Penalty is stiff. . . .
>
> Q: You wanted to scare him or let him know the penalty, that's why you told him to read the penalty?

A: Let him know the penalty section of it, that's correct.

. . .

Q: Why didn't you tell him – why didn't you just tell him, "It's a tough penalty, Don"?

A: It's more – it means more to them if they read it out loud.

Q: And it said "shall receive the penalty", didn't it?

A: Yes, it did.

Q: And you knew that that meant no probation, it meant "shall receive the penalty"?

Joint Appendix at 140-41. The prosecution then moved for a mistrial. Defense counsel objected. The court took the motion under consideration for fifteen minutes, returned to hear arguments from both parties, and then granted a mistrial over defense objections.

As it declared a mistrial, the court explained to defense counsel that its original command that petitioner "may have the testimony that he was shown the penalty from the statute and specify what the penalty is short of stating the penalty", actually meant:

> that no penalty was to be discussed directly or indirectly before the jury; that you were to be permitted to set the facts and circumstances of the confession so the jury would weigh the

> credibility to be given to that evidence, nothing was to be said to the mandatory sentencing, the type of sentence, anything on the subject.

Joint Appendix at 194. Finding that petitioner violated its order and irreparably prejudiced the jury, the court declared a mistrial.

A second trial was scheduled for July 29, 1996. On July 19, petitioner moved to dismiss the charge based on a violation of the Double Jeopardy Clause. After hearing arguments from the parties on July 26, the court denied petitioner's motion and expressed additional reasons why it had ordered the mistrial in April. The court then explained to petitioner that the problem at trial actually had been "the cumulative effect of a number of statements made throughout your opening argument leading up to the final question asked of Detective Mathews, which is clearly in violation of the court's instruction." Joint Appendix at 269. The court also stated that it had crafted the original order to allow some description of the conditions surrounding the confession. It concluded that the final question caused incurable prejudice because learning that probation would not be an option would force the jury to conclude that petitioner's fears of jail would necessarily come true upon conviction. The court also stated that it had been "very much mindful of the possibilities of a double jeopardy having attached here." *Id.* at 271. The judge finished her justification of the mistrial by stating, "I was particularly motivated by your inflammatory statements regarding rape and assault in prison, and that is the reason that I felt a curative instruction would be of no consequence . . . so this was a carefully considered decision." *Id.* at 272. Because Ohio

does not allow an appeal from an order denying a motion to dismiss, petitioner sought a stay of proceedings and habeas corpus relief from the United States District Court for the Northern District of Ohio.

C. Federal Habeas Proceedings

The District Court initially stayed the state court proceedings and then granted petitioner's request for a writ of habeas corpus. The District Court based its ruling on three grounds. First it found that the trial court's enforcement of the order excluding evidence of the life sentence violated petitioner's rights under the Due Process Clause of the United States Constitution. Second, it found that petitioner's counsel had not violated the trial court's pre-trial order. Third, the court found that no manifest necessity justified a mistrial and an instruction to the jury would have cured any prejudice. Respondent appeals from the District Court's provision of habeas corpus relief.

II. Discussion

A. Propriety of Review

Respondent argues that the District Court should not have stayed the state court proceedings against petitioner to allow the litigation of his double jeopardy claim before his second trial. Because petitioner is entitled to have his double jeopardy claim litigated before being retried, we reject respondent's arguments. The Fifth Amendment's Double Jeopardy Clause protects individuals "not against being twice punished, but against being twice put into jeopardy." *Ball v. United States*, 163 U.S. 662, 669 (1896). Therefore, "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge . . . must be reviewable before the subsequent

exposure occurs." *Abney v. United States*, 431 U.S. 651, 662 (1977). As this court has explained, the federal adjudication of double jeopardy claims raised on pre-trial petitions for habeas corpus is appropriate when those claims have been raised and rejected in the state trial court and under state law there is no right to interlocutory appeal. See *Gulley v. Kunzman*, 592 F.2d 283, 287 (6th Cir. 1979), *cert. denied*, 442 U.S. 924, *reh'g denied*, 444 U.S. 889. Petitioner satisfies these requirements. First, the trial court considered and rejected petitioners pre-trial motion to dismiss the second trial based on a violation of the Double Jeopardy Clause. Second, under Ohio law, "the overruling of a motion to dismiss on the ground of double jeopardy is *not* a final appealable order." *State v. Crago*, 53 Ohio St. 3d 43, 244 (1990). Under these circumstances federal adjudication was necessary to protect petitioner's rights under the Double Jeopardy Clause.

B. Standard of Review

This court reviews the District Court's grant of habeas corpus relief *de novo*. See, e.g., *West v. Seabold*, 73 F.3d 81, 84(6th Cir. 1996), *cert. denied*, ___U.S.___, 116 S.Ct. 2569. Our review of the state trial court's decisions, however, is governed by the standard established by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214(1996)("AEDPA"). Chapter 153 of the AEDPA, signed into law on April 24, 1996, amended Title 28 of the United States Code and altered the standard of review that a federal court must employ when deciding whether to grant a writ of habeas corpus. As amended, 28 U.S.C. §2254(d)(1997) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the Unites States; or
>
> (2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. Because petitioner filed his application for a writ of habeas corpus on July 26, 1996, after the effective date of AEDPA, the revised §2254(d) governs our inquiry into whether habeas corpus relief was appropriate in this case. See *Linda v. Murphy*, ___ U.S. ___, ___ S.Ct. ___, No. 96-6298, 1997 WL 338568, *8(U.S. June 23, 1997)("We hold that . . . the new provisions of chapter 153 generally apply only to cases filed after the Act became effective.")

The Sixth Circuit has not yet explained how courts should implement these new standards of review. The circuits that have construed the revised §2254(d) have developed two slightly different approaches to review. Under the approach adopted by the Fifth and Seventh Circuits, a federal court first decides whether the petitioner challenges a question of law, a question of fact, or a mixed question of law and fact. See *Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996); *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996), *rev'd on other grounds, Lindh v. Murphy*, No. 96-6298, 1997 WL 338568(U.S. June 23 1997). The categorization of the disputed issue determines which part of §2254(d) applies. For instance, if the dispute involves a factual question, §2254(d)(2) governs, and a federal court can grant a writ of habeas corpus only if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* Section 2254(d)(1) governs the two remaining types of questions. If a petitioner disputes the decision of a question purely of law, then the first clause of the §2254(d)(1) governs and "a federal court may grant habeas relief only if it determines that a state court's decision rested on a legal determination that was 'contrary to . . .clearly established Federal law, as determined by the Supreme Court." *Drinkard*, 97 F.3d at 768 (quoting §2254(d)(1)). If, however, a federal court reviews a mixed question of law and fact, then the second clause of §2254(d)(1) applies, and it should not grant habeas corpus relief unless the state court's decision amounted to "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1). See *Drinkard*, 97 F.3d at 767-68, *Lindh*, 96 F.3d at 870.

In contrast, the First Circuit adopted an approach that avoids the classification of the issue into questions of law, questions of fact, or mixed questions of law and fact. Because an earlier draft of the AEDPA adopted this taxonomic approach, but the final version did not, the First Circuit discarded taxonomy onto the version of the bill that Congress subsequently enacted." *Martin v. Bissonette*, ___F.3d___, N. 96-1856. 1997 WL 280602, *9(1st Cir. May 29 1997); see also *Id.* at *9n.9(comparing initial draft and final version of AEDPA). The approach adopted by the First Circuit proceeds as follows. Guided by the "contrary to" clause of established Supreme Court precedent provides a rule that compels an outcome to the issue at hand. If Supreme Court precedent provides no such rule, the court then determines whether the state court decision "involved an unreasonable application" of Federal law as established by the Supreme Court. See *Id.* at *10. Under the First Circuit approach, therefore, courts need not classify disputed decisions into either questions of law or mixed questions of law and fact. The First Circuit approach, although different than the one adopted by the Fifth and Seventh Circuits, probably will not lead to different results. As the First Circuit remarked, "pure questions of law will often be controlled by existing Supreme Court precedent, while mixed questions of law and fact will require a court to extrapolate from available caselaw." *Id.*

The difference between the two approaches has no practical significance in this case, which presents the question of whether there was manifest necessity for the state trial judge to declare a mistrial. The question of manifest necessity is heavily fact intensive—a mixed question of law and fact—and the Supreme Court has specifically avoided prescribing rigid rules that compel outcomes. See, e.g. *United States v. Jorn*, 400 U.S. 470,

489(1971). Therefore, under either approach we must decide whether the state court grant of a mistrial "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d)(1).

C. Double Jeopardy and the Manifest Necessity Doctrine

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, commands that no person shall "be subjected for the same offense to be twice put in jeopardy of life or limb," U.S. Const. amend. V, and applies to state prosecutions through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784(1969). The Double Jeopardy Clause serves a number of purposes. It precludes the State from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity." *United States v. Dinitz*, 424 U.S. 600, 606(1976)(quoting *Green v. United States*, 355 U.S. 184, 187(1957)). It protects defendants in cases "in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. *Gori v. United States*, 367 U.S. 364, 369(1961). It also protects the defendant's "valued right to have his trial completed by a particular tribunal". *Wade v. Hunter*, 336 U.S. 684, 689(1949); *accord Arizona v. Washington*, 434 U.S. 497, 503-04(1978); *Dinitz*, 424 U.S. at 606; *Jorn*, 400 U.S. at 484-85.

Nevertheless, the Double Jeopardy Clause allows retrial after the declaration of a mistrial when the defendant's "valued right" to a verdict from an empanelled jury is "subordinate to the public's interest

in fair trial designed to end in just judgments." *Wade*, 336 U.S. at 689. The established rule is that after a mistrial is declared retrial is barred unless the defendant consented to the mistrial, or there was "manifest necessity" for the mistrial. See, e.g., *Washington*, 434 U.S. at 505.

Because it is clear that petitioner objected to the declaration of mistrial, the central question in this case is whether manifest necessity existed for the mistrial. The unmistakable starting point for this analysis is *United States v. Perez*, 22 U.S. (9 Wheat.) 579(1824). In *Perez*, the Supreme Court first enunciated the enduring test for determining whether double jeopardy bars retrial after a mistrial:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . .

Id. at 580. In subsequent opinions the Court further explained and developed the contours of the "manifest necessity" doctrine.

Perez prescribed a case-by-case approach for this analysis. In the years since, the Court has "explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial. *Jorn*, 400 U.S. at 480, see also, *Illinois v. Somerville*, 410 U.S. 458, 462(1973)(reiterating that the *Perez* approach "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising in a criminal trial"); *Wade*, 336 U.S. at 691 (noting that courts must take "all circumstances into account" when deciding whether mistrial is appropriate, thereby precluding the application of "a rigid formula"). The manifest necessity inquiry is a flexible one, with reviewing courts analyzing the trial court's exercise of discretion in light of the particular facts and circumstances of each individual case.

The manifest necessity doctrine does not require us to find that the trial court had no alternative but to declare a mistrial. The Court has established that "the key word 'necessity' cannot be interpreted literally; instead . . . we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Washington*, 434 U.S. at 506. In answering the question of whether this "high degree" of necessity existed at the trial court, reviewing courts should apply greater scrutiny in some cases than it would in others. In *Washington*, the Court explained that "the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using

the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Id.* at 508 (footnotes omitted). In contrast, more deference to the trial judge is appropriate when the mistrial is based upon the trial judge's belief that a hung jury exists, and the judge's decision is entitled to special respect when the judge suspects that the jury may be biased. *Id.* at 509-10.

In *Washington*, the trial court declared a mistrial in the second trial of the defendant after defense counsel made improper comments during opening argument and attempted to introduce evidence of prosecutorial misconduct in the earlier trial. The prosecution moved for a mistrial on the grounds of potential juror bias. The Court realized that the trial judge's decision that they jury was biased was entitled to great deference, but also recognized that it still had a duty to inquire into whether the judge exercised sound discretion. It explained that "[t]he trial judge . . . 'must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate". *Id.* at 514 (quoting *Jorn*, 400 U.S. at 486). The Supreme Court concluded that manifest necessity existed for a mistrial in *Washington* because defense counsel had "aired improper and highly prejudicial evidence" and because the trial judge, "evincing a concern of the possible double jeopardy consequences of an erroneous ruling, . . . gave both the defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial." *Id.* at 515-16.

In summary, a long history of Supreme Court precedent has bolstered and reaffirmed the doctrine established in *Perez*. Mistrials should not be declared unless "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Perez*, 22 U.S. (9Wheat.) at 580. Although trial courts should be accorded deference in making this determination, they must employ sound discretion and must consider the defendant's right to end his confrontation with the state through a verdict from the particular tribunal he faces. The judicial power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for plain and obvious causes." *Id.*

D. Analysis

We start our analysis of this case with the trial judge's order excluding evidence that petitioner faced a life sentence. The trial court based its order on what it considered an Ohio rule that juries should never consider potential sentences in determining guilt or innocence. In this case, however, petitioner's defense was that he confessed to the crime after reading the statutory penalty of mandatory life imprisonment when Detective Mathews suggested that therapy or psychiatric counseling might be available if he confessed. Petitioner sought to challenge the credibility of his own confession by establishing that he confessed not because he was guilty but to avoid a long sentence of imprisonment, here a life sentence. Thus, petitioner's defense required him to establish that at the time of his confession he knew that a conviction would carry such a sentence.

In *Crane v. Kentucky*, 476 U.S. 683(1986), the Supreme Court held that it was unconstitutional for a court to prevent a defendant from challenging the credibility of his confession by excluding all evidence of the circumstances under which the confession was made. The trial court in this case attempted to chart a path between *Crane's* holding that a court may not preclude defendant from challenging the credibility of his confession and what it considered to be a hard and fast Ohio rule against informing the jury of the specific penalty for a crime. The order ambiguously stated that the defendant "may have the testimony that he was shown the penalty from the statute and specify what the penalty is short of stating the penalty." Joint Appendix at 160. Both parties and the court recognized that the petitioner would not be allowed to inform the jury that he faced life imprisonment. Beyond that, the exact scope of the order was not clear.

In his opening statement, defense counsel described petitioner's fears of potential rape and abuse if he were to be imprisoned. The prosecution objected, but the court overruled it, allowing petitioner to continue with his theory that fear of punishment motivated his confession. The controversy about the limits of the judge's order reemerged during cross-examination of Detective Mathews, when petitioner's counsel elicited that probation was not available for the offense with which petitioner had been charged. At this point, respondent objected and moved for a mistrial, which the court granted.

Respondent, relying upon *State v. Bayse*, 122 Or. App. 608, 859 P.2d 542(1993), argues that petitioner's violation of the court order established manifest necessity for a mistrial. In *Bayse*, an Oregon appellate court held,

under state law, that manifest necessity for mistrial is established by defense counsel's deliberate and repeated attempts to undermine a pretrial order. The federal law governing manifest necessity, however, shuns categorical justifications for mistrials. Even if counsel violates a pretrial order, manifest necessity must be determined by looking at all the circumstances of the case. See, e.g., *Jorn*, 400 U.S. at 480(noting that the "Court has, for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial"). In this case, it is not even clear that petitioner violated the court's order allowing him to "have the testimony that he was shown the penalty from the statute and specify what the penalty was short of stating the penalty." Petitioner's counsel was allowed to state, over respondent's objections, both that a penalty was shown to him and his fears of being raped and abused in prison. The additional information that probation was not an option, without reference to the length of imprisonment, did not clearly violate the language of the court order. In these circumstances, we decline to hold that the trial court had manifest necessity to declare a mistrial merely because it considered defense counsel's conduct to have violated its pre-trial order.[1]

Respondent also argues that the trial court had manifest necessity to declare a mistrial because petitioner exposed the jury to the irrelevant and inadmissible information that probation was not available for the charge. It asserts two reasons why Detective Mathews'

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[1] The District Court, in granting petitioner's writ of habeas corpus, held that the judge violated petitioner's constitutional right to due process when it enforced its pre-trial order. We do not reach this issue because we find that regardless of the order's constitutionality there was no manifest necessity for a mistrial.

statement that he knew that probation would not be available if petitioner were convicted was irrelevant. First, the statute that petitioner read does not mention probation; and second, the real issue was what petitioner thought the statute meant, not what Detective Mathews knew it meant. Respondent argues that the trial court correctly decided that an instruction could not remedy the bias petitioner had instilled in the jury, thereby necessitating a mistrial. According to the trial court, the jury was prejudiced by the cumulative effect of petitioner's repeated emphasis, from opening statements onward, of the punishment that would accompany conviction. The trial judge decided that the potential for prejudice became irreparable when the jury learned that probation would not be available during Detective Mathews' cross-examination testimony. The trial judge believed that at this point petitioner's fears of what might happen in prison would become certainties in the minds of the jurors.

We find that, even if Detective Mathews' testimony was irrelevant, the amount of prejudice that could have existed, if any existed at all, was minuscule. During the cross-examination of Detective Mathews, the jury learned that probation would not be available, but it never learned the length of the sentence that would be imposed. Without knowing the length of the sentence that petitioner faced, the fact that probation would not be available is unlikely to prejudice the jury or affect its ability to reach an impartial verdict. When the penalty is "stiff", no juror would expect a defendant to receive probation. Although the decision of a trial court to declare a mistrial based on potential juror bias is entitled to special respect, it would be an unreasonable application of the law, as established by Supreme Court precedent, to conclude that manifest necessity existed for a mistrial in

this case. We agree with the district Court that a simple corrective instruction would have sufficiently protected against juror bias. Because this case lacks the urgent circumstances or high degree of necessity required to justify a mistrial, double jeopardy bars the retrial of petitioner.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the District Court.

A23

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DONALD RAY HARPSTER — CASE NO.: 5:96cv1634

Plaintiff — Judge Sam H. Bell

vs.

STATE OF OHIO — ORDER

Defendant

Filed: Jul. 30, 1996 4:55 PM

Presently before the court is the petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254 of Mr. Donald Ray Harpster, who is currently is in the custody of the State of Ohio and whose state court trial is imminent. The State of Ohio has opposed Mr. Harpster's petition. The petition is properly before the court because Petitioner has no available state corrective process available to him. 28 U.S.C. §2254(b). See also, State of Ohio v. Crago, 53 Ohio St. 3d 243 (1990), cert. denied, 499 U.S. 941 (1991) (overruling of motion to dismiss on double jeopardy grounds not a final appealable order under Ohio law). This court held hearings on the matter on July 26 and 29, 1996, and is now prepared to render its decision.

It should be made clear that this opinion does not determine the guilt or innocence of Petitioner; it does not call into play this court's views concerning the admission of evidence except as otherwise stated below. Petitioner's

request calls for this court's consideration of a fundamental protection guaranteed by the Constitution of the United States.

Background

Petitioner was the subject of several interrogations regarding the alleged crime for which he was eventually indicted. The first three interrogations were apparently fruitless. In the fourth interrogation, however, the investigating officer changed his questioning technique. During that interrogation, the officer showed Petitioner the Ohio Code Chapter having to do with the crime alleged. After suggesting (but not promising) that Petitioner might qualify for some sort of remedial counseling if he were to confess, the officer made Petitioner aware that the punishment for that particular offense was life imprisonment. The Petitioner made a statement soon thereafter.

Before the trial on the merits, the Petitioner moved to suppress that statement, alleging that it was not freely made. The trial court found otherwise and allowed the statement into evidence.[1] Also before trial, the trial court Judge ruled that Petitioner could not inform the jury that the penalty with which he had been confronted was a life sentence. Petitioner's counsel did not mention the penalty at trial, but did graphically describe his client's thought process when he made the statement, which description was expressly allowed. When cross-examining the State's last witness, Petitioner's counsel also referred to the mandatory nature of the undetermined penalty, stating that the offense charged was not a probationable offense. At that point, the State requested and the trial court

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[1] That holding is not now at issue.

granted a mistrial. The State now attempts to retry Petitioner for the same alleged crime. Petitioner argues that a second prosecution would be violative of his rights as protected by the Double Jeopardy Clause and asks this court for a writ of habeas corpus.

Analysis

The Double Jeopardy Clause affords a defendant protection from a second prosecution for the same offense. Specifically, "it protects against retrial following a mistrial only when, taking all the circumstances into consideration, there is a manifest necessity for [declaring the mistrial], or the ends of public justice would otherwise be defeated." United States v. Perez, 22 U.S. 579, 580 (1824); Arizona v. Washington, 434 U.S. 497 (1978). "[M]anifest necessity has come to mean not absolute necessity, but rather a 'high degree' of necessity. The trial court must be given broad latitude to exercise its considered judgment in assessing the specific facts and circumstances attendant of each case." Glover v. McMackin, 950 F.2d 1236, 1240 (6th Cir. 1991).

In the instant case, Petitioner asserts at least three arguments in favor of his claim that the impending state court trial would subject him to be "twice put in jeopardy of life or limb", in violation of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784, 793-96 (1969). All three focus on whether there was manifest necessity to grant the prosecutor's motion for a mistrial. First, Petitioner argues that the trial court order which he supposedly violated was unconstitutional. Second, he argues that he did not violate the order. Finally, he argues that there were alternatives to the extreme action of granting a mistrial.

The first question for this court is whether the trial court's order, the violation of which was the basis for the mistrial, is itself clearly in violation of the Due Process Clause of the United States Constitution. If so, Petitioner correctly argues that said incorrect evidentiary ruling cannot be the basis for the trial court's "manifest necessity" to declare a mistrial.

The order in question precluded Petitioner from offering evidence that his statement concerning the crime with which he stands charged was elicited only after he was informed that, if convicted, he could be subject to a life sentence. In support of his argument to admit this evidence, Petitioner relies on Crane v. Kentucky, 476 U.S. 683 (1986). The Crane Court considered a Kentucky court ruling which precluded a defendant from introducing *any* evidence regarding the physical or psychological environment in which the police secured his confession. That case explains as follows:

> [T]he physical and psychological environment that yielded the confession can . . . be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. . . .Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? . . [T]he

> Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be hears. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing.

Crane v. Kentucky, 476 U.S. at 688-91 (citations and quotations omitted).

In the instant case, it is clear that the officer's reference to the life sentence during the interrogation is central to the Mr. Harpster's claim of innocence. An implied threat of life imprisonment might indeed prompt someone in this criminal defendant's position to confess to the crime alleged regardless of his guilt or innocence. Nevertheless, the trial court ruled that mention of the life sentence to the jury was impermissible, instead allowing

the defense counsel only to "specify what the penalty is short of stating the penalty". (Tr. at 9.)

It is this court's duty, pursuant to Crane, to determine whether there existed a valid state justification to exclude this relevant and perhaps exculpatory evidence. Here the state justification is the time-honored rule of precluding the jury from hearing the penalty associated with the crime charged, so as to preclude a juror from injecting his or her evaluation of the punishment upon his or her determination of guilt or innocence. Clearly, the trial judge in the instant case sought out a compromise that would not taint the jury while still allowing Mr. Harpster the ability to explaint the circumstances of his confession.

This court must disagree with the state court's solution. Describing the threatened punishment as "pretty stiff" is simply not an adequate substitute for telling the jury that defendant was confronted with a life sentence. It does not sufficiently address the jury's question: "If the defendant is innocent, why did he previously admit his guilt?" Crane at 689. Granted, the trial judge in the instant case did seek a compromise that would allow Mr. Harpster to offer a partial explanation of his confession, while preventing the jury from being tainted by evidence of the punishment for the crime in consideration. It would appear to the court, however, that when balancing a defendant's weighty need to explain the circumstances of his confession, and the desire of the state to avoid the *possibility* that a juror will improperly consider the defendant's punishment, the Constitution requires that the balance be tipped in favor of the defendant.

This court hesitates to base its ruling solely on a trial court's misreading of constitutional law. Were this a

simple question of evidence, this court would merely express its disagreement with the trial court's balancing of the competing interests, and then defer to the decision of the trial court who is traditionally in a superior position to weigh those interests. In the ordinary course of events, this due process question would be one raised on appeal and once answered, would be correctable on remand in a second trial. Unfortunately, in the instant case, the trial court judge ruled out such an approach when she declared a mistrial. The court has little recourse but to hold that the order upon which the mistrial was based violates due process.

The second argument raised by Petitioner in his challenge to the trial court's finding of "manifest necessity" is that he did not violate the court's order to not discuss the penalty. Again, the court's order was as follows:

> You may have the testimony that he was shown the penalty from the statute and specify that the penalty is short of stating the penalty. You may have him testify that he was presented with the information so that you may argue whatever you wish to argue from the fact that the Defendant recognized that a certain penalty could be imposed in the particular case.

(Tr. at 9-10.) Clearly, the intent of this language is to allow Petitioner to explain some of the pressure he felt at the time of his confession, short of telling the jury that he was confronted with a life sentence. Petitioner's

counsel's mention of probation has to do with simply that, probation. While it does affect the "stiffness" of the eventual penalty, it does not alert the jury as to whether that penalty is for two days incarceration or for life imprisonment. Reference to life imprisonment was clearly the concern of the trial court when it made its in limine ruling, thus it is unclear as to how the description of the terms of any imprisonment could taint the jury one way or the other. This conclusion is further supported by the trial court's ruling during opening argument that Petitioner counsel's loose and perhaps inflammatory language regarding the unseemly things which could happen to his client in prison were not objectionable. After that ruling, Petitioner's counsel could have reasonably concluded that his leeway was fairly broad and long, as he did not specifically mention the life sentence.

Finally, Petitioner argues that there was no "manifest necessity" to grant a mistrial because there were several routes short of a mistrial open to but unpursued by the trial court. In determining whether the prejudicial impact of defense counsel's statements rendered mistrial a manifest necessity, this court will give the trial judge's decision the highest degree of deference. See Malinovsky v. Court of Common Pleas, 7 F.3d 1263, 1271(6th Cir. 1993), cert. denied, __U.S.__, 114 S.Ct. 1300, 127 L.#d.2d 652 (1994) ("The decision of a trial judge to declare a mistrial is treated deferentially; however, the judge is required to exercise 'sound discretion' in so declaring." (citing Arizona v. Washington, 434 U.S. at 506 n.18);) United States v. Scott, 437 U.S. 82(1978). "Whether the trial court looked at alternative measures is considered in determining whether proper discretion was exercised." Malinovsky, 7 F.2d at 1271 (citing Glover v. McMackin, 950 F.2d 1236, 1242(6th Cir. 1991)). In the instant case, the trial judge

granted the motion for mistrial using the following language:

> The ruling of the Court in limine was that no penalty was to be discussed directly or indirectly before the jury; that you were to be permitted to set the facts and circumstances of the confession so the jury would weigh the credibility to be given to that evidence, nothing was to be said to the mandatory sentencing, the type of sentencing anything on that subject. The testimony prior to break clearly went beyond the court's ruling that it is the Court's opinion that no curative instruction is now possible to provide both parties a fair trial in this particular matter.

(Transcript at 515.)

A few months later, upon consideration of Mr. Harpster's motion to dismiss based on double jeopardy grounds, the court further reasoned that her order granting the mistrial was due to:

> "the cumulative effect of a number of statements made throughout your opening argument leading up to the final question asked of Detective Mathews, which was clearly in

> violation of the court's instruction, the final statement being that this was not a probational offense."

(Hearing Tr. at 18.)

The court then went on to explain which statements were the problematic ones. First the trial judge referred to Mr. Harpster's counsel's statements that at the time of his confession, he was concerned that if he were imprisoned he could be raped and beaten, that he was not going to see his family again, and that he was not going to see his son again. (Hearing Tr. at 19.) However, when these comments were the subject of the state objection at trial, the Judge overruled that objection. (Tr. at 180). Later, the court explains the overruling of the objection as follows, "I permitted you to continue with your opening argument only because you used the word 'could' rather 'would' or 'mandatory', and it was on that basis that I overruled the objection because it did not violate my order." (Hearing Tr. at 19.) The trial court found that the final "coup de grace was your reference . . . that it was not a probational offense." (Hearing Tr. at 21.) Based on these two statements by Mr. Harpster's counsel, the court "came to the conclusion that no curative instruction could remove the manifest injustice in this particular case; and I was particularly motivated by your inflammatory statements regarding rape and assault in prison, and that is the reason I felt that a curative instruction would be of no consequence, that we cold not unring this particular bell . . .". (Hearing Tr. at 21.)

In sum, the court concluded that a curative instruction would not overcome the offending language in the criminal defendant's opening statement, which

language the court had previously expressly allowed, and the reference to a lack of probation for the offense charged. But it has already been determined that the trial court would allow Mr. Harpster's counsel to describe the penalty as long as he did not mention life imprisonment. A lack of probation is meaningless if the jury is unaware of the term to be served. It is thus difficult to see how a manifest injustice would arise based on the cumulative nature of both the previously approved statements of counsel and testimony regarding the quality of the potential undetermined prison term. Granting a mistrial is extraordinary relief that should only be done where there is a high degree of necessity. There is no indication in this case that such necessity exited. Surely a curative instruction would have sufficed.

Conclusion

Petitioner stood accused of a terrible crime. By all accounts the case against him hinged on the confession he made during his fourth interrogation; the bases for the mistrial in the court below all related to the defense's attempt to explain the circumstances of that interrogation. Simply put, that mistrial was improvidently granted. The few potentially inflammatory statements of counsel in the case's opening were expressly allowed by the court. Moreover, the court order to disallow reference to the life penalty with which Mr. Harpster was confronted during his interrogation, was itself unconstitutional. Even if it were not, Mr. Harpster counsel's later statement regarding probation was not clearly in violation of that order, and in any case, could not be said to irrevocably prejudice a jury. In short, there was virtually no prejudicial evidence before the jury which the court itself had not already approved.

The Petitioner's motion for a writ of habeas corpus must be granted in this case because, after giving the trial judge's determinations the "highest degree of respect", the court finds a lack of necessity for a mistrial. When a mistrial is declared "at the behest of the prosecutor . . . the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him [is balanced] against the public interest in insuring that justice is meted out to offenders." United States v. Scott, 437 U.S. 82, 92 (1977). Here, the Petitioner's right to be put at risk but once, would be taken from him if he were to proceed again to trial.

Once more, this is not a question of "technicalities", it is a question of constitutional magnitude. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution was meant to serve as a restraint on courts and prosecutors, Garrett v. United States, 471 U.S. 773, 793(1985), and as a protection for individuals from the "continued embarrassment, anxiety, and expense [of reprosecution], while decreasing the risk of an erroneous conviction . . .". Ohio v. Johnson, 467 U.s. 493, 498-99 (1984). These rights are so important that the Fifth Amendment prohibits a second trial unless there is shown a manifest need to declare the first trial to be a mistrial. In the instant matter, there was very little reason, let alone a manifest necessity, to grant the prosecutor's motion for mistrial. Because this court finds that Petitioner is in the custody of the State of Ohio in violation of the Constitution of the United States, his motion for a writ of habeas corpus is GRANTED. Defendant State of Ohio shall release Petitioner from any and all forms of custody.

IT IS SO ORDERED.

s/Sam Bell
Sam H. Bell
United States District Judge

A36

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DONALD RAY HARPSTER — CASE NO.: 5:96-CV-1634

Plaintiff — Judge Sam H. Bell

vs.

STATE OF OHIO — ORDER

Defendant

Filed: Aug. 21, 1996 11:42 AM

On July 30, 1996, this court issued its order in this case. On 9 August, the state moved to alter and amend that order; petitioner's response was filed today August 20.

The court has reviewed and considered the positions set forth by both parties. It finds no reason to reconsider the judgment previously entered; neither is there reason here to restate the reasoning which resulted in the judgment order to which reference is made.

There is no need for further oral argument; the State's motion is denied.

IT IS SO ORDERED.

s/ Sam H. Bell
U.S. DISTRICT JUDGE

A37

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DONALD RAY HARPSTER — CASE NO.: 5:96CV1634

Petitioner — JUDGE BELL
MAGISTRATE GALLAS

vs.

STATE OF OHIO

Respondent — ORDER GRANTING STAY OF STATE COURT PROCEEDING

Filed: Jul. 26, 1996 4:03 PM

Upon motion of Petitioner and for good cause shown, it is hereby ordered that the trial of the State of Ohio v. Donald Ray Harpster, Case No. 95-11-2944 presently set to commence on July 29, 1996 at 9:00 a.m. is stayed for a period of 24 hours.

IT IS SO ORDERED.

s/ Sam Bell

A38

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY Term 19 96

THE STATE OF OHIO NO.: CR 95 11 2944

vs.

DONALD RAY HARPSTER JOURNAL ENTRY

Filed: July 26, 1996

THIS DAY, to-wit: The 26th day of July, A.D., 1996, now comes the Prosecuting Attorney on behalf of the State of Ohio, and the Defendant, DONALD RAY HARPSTER, being in Court with counsel, KIRK MIGDAL, for a hearing on the Defendant's Motion to Dismiss the Indictment on the Grounds of Double Jeopardy in Violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, and upon due consideration of this Court, IT IS HEREBY ORDERED that the Defendant's Motion is DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion for Continuance of Trial in this case, set for July 29, 1996, is DENIED.

APPROVED:
July 26, 1996
jss

BETH WHITMORE, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Alison McCarty
Prosecutor Philip Bogdanoff
Criminal Assignment
Attorney Kirk Migdal

A40

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

JANUARY Term 1996

THE STATE OF OHIO NO.: CR 95 11 2944

vs.

DONALD RAY HARPSTER JOURNAL ENTRY

Filed: Apr. 22, 1996 12:11 PM

THIS DAY, to-wit: The 15th day of April, A.D., 1996, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, DONALD RAY HARPSTER, being in Court with counsel, KIRK MIGDAL, for trial herein. Heretofore, on April 15, 1996, a Jury was duly empaneled and sworn, and the trial commenced and continued until 10:00 O'Clock A.M. on Thursday, April 18, 1996, at which time, upon the Motion of the Prosecuting Attorney on behalf of the State of Ohio, the Court declares a MISTRIAL, and further discharges the said Jury without prejudice to the prosecution of this case.

Upon due consideration of this Court, IT IS HEREBY ORDERED that the State's Motion for Bond Revocation shall be DENIED, and further, the Defendant be released on the same bond which was continued to await NEW trial in this case, which was set for June 17, 1996 at 9:00 A.M.

INDICTMENT FOR: FELONIOUS SEXUAL PENETRATION (1)

APPROVED:
April 19, 1996
jh

BETH WHITMORE, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Alison McCarty
Attorney Kirk Migdal
Criminal Assignment

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
(Effective 1791)

Ohio Revised Code

2907.12 Felonious Sexual Penetration.

(A)(1) No person, without privilege to do so, shall insert any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person, without privilege to do so, shall insert any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of felonious sexual penetration, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.

(C) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

2951.02 Criteria for and probation or suspension of sentence; conditions.

(F) An offender shall not be placed on probation, and shall not otherwise have his sentence of imprisonment suspended pursuant to division (D)(2) or (4) of section 2929.51 of the Revised Code when any of the following applies:

(1) The offense involved is aggravated murder or murder.
(2) The offender is a repeat offender or a dangerous offender, as defined in section 2929.01 of the Revised Code.
(3) The offense involved was not a violation of section 2923.12 of the Revised Code and was committed while the offender was armed with a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code.
(4) The offense involved is a violation of section 2907.02 or 2907.12 of the Revised Code.
(5) The offender is not eligible for probation or shock probation pursuant to division (C) of section 2903.06 or 2903.07 of the Revised Code or is sentenced to a term of actual incarceration.
(6) The offense involved was a violation of section 2923.12 of the Revised Code, the weapon involved in the offense was a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, and the offense involved was committed aboard an aircraft or with purpose to carry a concealed firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, aboard an aircraft.

28 U.S.C. § 1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291

Section 1291, Title 28, U.S. Code provides as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direction review may be had in the Supreme Court."